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SUBJECT: Third Session of the WIPO Committee on
Development and Intellectual Property

¶1. SUMMARY: The 3rd session of the WIPO Committee on Development and Intellectual Property (CDIP) moved ahead (slowly) in its implementation of 45 recommendations concerning development and IP. These recommendations were approved by the WIPO General Assemblies (GA) in October 2007. In the first two sessions of the CDIP, Member States approved activities and work programs for 11 recommendations and initiated discussions on another four recommendations. The focus of discussion in the third session included new activities to implement eight related recommendations under three broad themes: IP and the Public Domain; IP and Competition; and IP, Information and Communications Technology (ICTs) and the Digital Divide. Reaching agreement on the activities for these eight recommendations will allow the WIPO Secretariat to seek funding for their implementation during the 2010/2011 program and budget meetings in the fall. Debate also centered on how to coordinate and report on development agenda implementation with other WIPO committees.
END SUMMARY.

¶2. The Third Session of the CDIP was held from April 27 to May 1, 2009. 111 Member States and 49 Observers participated in the meeting. U.S. delegation members were Michael Shapiro, Senior Counsel, Office of Intellectual Property Policy and Enforcement, USPTO (head of delegation); Neil Graham, Attorney Advisor, Office of Intellectual Property Policy and Enforcement, USPTO; Carrie LaCrosse, Foreign Affairs Officer, Office of Intellectual Property Enforcement, U.S. Department of State; and Deborah Lashley-Johnson, IP Attache, U.S. Mission, Geneva.

¶3. At the start of the meeting, and per the invitation of the Chair of the CDIP (Ambassador Trevor Clarke of Barbados), Director General Francis Gurry addressed the Committee. The DG reiterated his personal commitment to the Development Agenda, and noted that all sectors/divisions of the Organization would contribute to ensuring that all recommendations are implemented and integrated into WIPO's activities. He explained that coordination of the implementation of the Development Agenda would be the responsibility of the Development Agenda Coordination Division (DACD), which reports directly to him. The Director General emphasized that implementation of the Development Agenda recommendations is a shared responsibility of the Secretariat and WIPO Member States. The Director General also highlighted the importance of reporting and evaluation, and expressed his commitment to report to the CDIP annually on the implementation of

recommendations.

SLOW GOING: Focus on the Past

¶4. Despite the commitment demonstrated by the DG on effective implementation and coordination, certain delegations engaged in extensive, time-consuming, and substantially unproductive discussion of ongoing WIPO activities to implement 19 recommendations already approved by the 2007 GA for early implementation. India, Egypt, Sri Lanka, and South Africa were particularly active in questioning WIPO expert staff members on these activities, setting a contentious tone for the meeting.

¶5. On day three, discussions opened regarding a proposed, new thematic approach to the work of the CDIP. Under the thematic approach, activities proposed by the Secretariat to implement identical or similar elements of selected GA-approved recommendations would be grouped under a single theme (such as IP and the Public Domain or IP and Competition) and assigned to a single WIPO project manager. The new approach was previewed in two informal information sessions in advance of CDIP

¶3. Group B (group of industrialized countries), the United States and a few other member governments intervened to support the new approach, which was generally viewed by these countries as time-efficient and financially prudent (eliminating potential duplicative activities). However, certain developing countries intervened repeatedly to demand

certain procedural and substantive safeguards (to ensure that the process remained "Member State-driven" and that the proposed projects would not exhaust the recommendations). In particular, India, Pakistan, Sri Lanka, Egypt, Brazil and South Africa asserted that for recommendations that had not yet been discussed, guarantees were needed to ensure that the projects fully and adequately implemented the recommendations. Further, these countries said that the new thematic projects were based on recommendations that had (for the most part) not yet been discussed, and were therefore problematic. To address these concerns, Chairman Clarke tabled his own document ("Conditions for Thematic Projects"), which appeared to be aimed at closing the discussion of the proposed thematic approach and opening the discussion of the thematic projects themselves. However, contentious debate ensued over the document, and the Chairman withdrew his document. Nonetheless, general agreement was reached that: (i) each recommendation would be discussed first in order to agree on the activities for implementation; (ii) recommendations that dealt with similar or identical activities would be brought under one theme, where possible; and (iii) implementation would be structured in the form of projects and other activities, as appropriate, with the understanding that additional activities may be proposed.

NEW ACTIVITIES

¶6. On days four and five, the Committee finally moved forward in its discussion of proposed new activities for recommendations under the themes concerning IP and the Public Domain; IP and Competition; and IP, ICTs and the Digital Divide. The US delegation intervened to support the full range of the proposed public domain activities, including a proposed pilot exercise to establish a national traditional knowledge (TK) database to prevent the granting of erroneous patents. In the end, the CDIP broadly agreed to move forward on the activities to implement the public domain

thematic project. However, on the basis of an intervention by Brazil, and to US displeasure, this component of the project was dropped. In its place, CDIP members instructed the Secretariat to begin a survey of existing national TK databases, with a longer term view of establishing a WIPO TK portal with links to national TK databases.

¶17. Brazil also tabled a three-part amendment to the TK database project to advance within CDIP its longstanding proposal (within the WIPO Standing Committee on Trademarks, Geographical Indications and Industrial Designs, SCT) on the "Non-Exhaustive List of Customary Names Used in Brazil Associated with Biodiversity," which drew a sharp response from the US delegation. Under the proposed amendment, the Secretariat would be required to (1) publish Brazil's list of 5,000 names falling into this category, (2) conduct an investigation of the misappropriation of such names (beginning with cases supplied by Brazil, which would be likely to target U.S. companies), and (3) prepare a study on the "adverse impact" of such misappropriations on Brazil's indigenous populations.

¶18. In response, the US delegation reminded CDIP members that the Brazilian proposal raised complex issues of trademark law (such as the territoriality of trademarks and diverse national concepts of "distinctiveness"), which are under active consideration in the SCT. The US went on to say that the SCT is the appropriate committee for consideration of this proposal because of its subject matter expertise. Finally, the US delegation noted that the Brazilian amendment raised important issues of how the CDIP would coordinate its work with other WIPO committees. However, Brazil was very adamant in having its proposal approved by the Committee, arguing that any CDIP member could table any amendment to any proposed DA implementing activity at any time, without regard to the work program of other committees. Brazil also took the Secretariat to task for using "scarce resources" as a pretext for hobbling DA activities proposed by Member States (a view later supported by

India and other delegations) and for the Secretariat's earlier suggestion that Brazil should have tabled a written proposal to give the Secretariat and Member States sufficient time to review it. In addition, Brazil threatened to withdraw its support for the thematic approach entirely, which the Brazilian delegation characterized as conditioned on its understanding that Member States would be unfettered to propose and modify any activity before the CDIP. The US reminded the CDIP that, like all WIPO committees, the CDIP was governed, among other things, by adopted Rules of Procedure, pointing specifically to Rule 21 (governing the tabling of proposals by delegations). The US further argued that Brazil's proposal was very complex and dropped on Member States without prior notice or a formal written submission.

¶19. With respect to the proposed thematic project on "IP and Competition Policy," the US delegation intervened to raise general concerns and specific questions to this proposal, consistent with interagency cleared instructions. With the assurance given by the Secretariat that the project would be non-normative in nature, non-duplicative of IP related competition activities undertaken in other international organizations, and any WIPO activities conducted in this area would be on a policy-neutral (given lack of an international framework and the diversity of views on competition policy among countries and regions), the US

delegation decided not to block consensus on this proposal. However, on the basis of the same concerns expressed above, the US intervened to oppose a proposal tabled by the delegation of Egypt to amend the competition project to include the preparation by WIPO of a ?Guide? on anti-competitive practices, a proposal that is likely to be re-introduced in CDIP 4 at the November 2009 meeting.

¶10. Late on the last day of the meeting, the CDIP took up discussion of a thematic project on the ?IP, ICT and the Digital Divide,? which sets forth activities to implement three recommendations, including Recommendation 19 (which states the goal of facilitating ?access to knowledge and technology for developing countries and LDCs? as part of WIPO's norm setting activities). The delegation of Egypt, supported by India, intervened to request the Secretariat to remove Recommendation 19 entirely from this thematic project largely because Egypt and others argued that the concept of facilitating ?access to knowledge? was sufficiently broad and important to warrant separate implementing activities. While the US could not support removing the projects' reference to Recommendation 19, DG Francis Gurry suggested adding the phrase ?Access to Knowledge? to the title of the project in an effort to bridge differences. The US delegation accepted the DG's suggestion, and Egypt and others eventually agreed, on the condition that the project document note that Recommendation 19 is only ?partially implemented? by this project.

OVERSIGHT ARGUMENTS

¶11. The Committee discussed coordination mechanisms and modalities for monitoring, assessing and reporting on the implementation of recommendations. The Committee decided that interested Member States may submit their proposals to the Secretariat by June 30, 2009. These submissions, in addition to the ideas offered in the discussions during the present session, will be compiled and presented to the fourth session of the CDIP for further discussion and possible decision on this subject. Discussion on this issue was highly contentious as both the Africa Group and Pakistan, supported by other Asian countries, tabled proposals giving the CDIP broad-ranging authority to interact with the GA and other WIPO Committees while also diminishing the role of the Secretariat in coordinating development agenda programs and activities. The African proposal, for example, called for the creation of a new, freestanding Working Group under the authority of the CDIP (composed of the Chairs and Vice Chairs of all WIPO committees and regional coordinators plus two). Pakistan's proposal called for all WIPO

reports, studies, documents and negotiating texts to incorporate the DA recommendations on norm-setting. In its statement, Group B rejected the formation of new CDIP coordinating bodies, instead proposing a broad set of principles that would discharge this part of the CDIP's mandate consistent with longstanding WIPO procedures applicable to all committees. The EU, US, Canada and Korea also expressed disapproval with establishing new coordination mechanisms, with the UK making a particularly strong intervention, noting that the CDIP itself was the ?coordination body? envisioned by the GA. This debate will likely continue in CDIP for some time, as Egypt persisted in arguing that submissions of Member States on coordination should allow sufficient time to bring these proposals to the attention of the 2009 GA (which for timing reasons will not occur) and proposed conducting informal consultations between CDIP 3 and the 2009 GA, which was rejected by the US.

¶12. The next CDIP meeting is scheduled for November 16-20, 2009. The Chair's summary of the 3rd session of CDIP can be found at:
http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_3/cdip_3_summary.pdf

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